

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

K.K-M. Individually and as
 Kingship Legal Guardian of
 the minor children R.M. and
 A.W. ,

CIVIL ACTION NUMBER:

17-11579

TEMPORARY RESTRAINING ORDER

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF
 EDUCATION, ET AL, ,

Defendants.

Mitchell H. Cohen Building & U.S. Courthouse
 4th & Cooper Streets
 Camden, New Jersey 08101
 July 1, 2019

B E F O R E:

THE HONORABLE ROBERT B. KUGLER,
SENIOR UNITED STATES JUDGE

A P P E A R A N C E S:

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 609-439-5420

Proceedings recorded by mechanical stenography; transcript
 produced by computer-aided transcription.

1 (The following took place in open court)

2 THE DEPUTY COURT CLERK: All rise.

3 THE COURT: Good morning.

4 MR. THURSTON: Good morning, Judge.

5 THE COURT: Have a seat, please. Happy July 1st.

6 MS. BECK: Good morning, your Honor.

7 THE COURT: All right, this is the matter of K.K-M.

8 Versus New Jersey Department of Education. Let's have

9 appearances. For the plaintiffs, please.

10 MR. THURSTON: Okay. And thank you, your Honor.

11 Robert Thurston on behalf of the plaintiffs and K.K-M.

12 MS. BECK: Good morning, your Honor. Victoria Beck
13 from Parker McCay for Gloucester City.

14 THE COURT: All right. As I understand from the
15 papers that the School Board has agreed to let them stay until
16 2020? Is that correct?

17 MS. BECK: No, your Honor. They were permitted to
18 stay through the end of the school year which is now over.

19 THE COURT: That's not what your letter says. Your
20 letter of May sixteenth says, it continues to be the
21 District's intention to permit the students to remain enrolled
22 to the conclusion of the 2019 to 2020 school year.

23 MS. BECK: I see that, your Honor. That was a
24 mistake. It was the eighteen, nineteen school year. I
25 apologize for that.

1 THE COURT: That's a pretty big mistake.

2 MS. BECK: Yes. Sorry about that.

3 THE COURT: That's the whole case.

4 MS. BECK: Right.

00:24 5 THE COURT: So what are you doing now for the
6 students?

7 MS. BECK: Well, the students they concluded a couple
8 weeks ago.

9 THE COURT: They what?

00:24 10 MS. BECK: They -- the school year concluded a couple
11 week ago, the eighteen, nineteen school year, they concluded
12 the end of the school year and now it's, it's summer.

13 THE COURT: And? What's the status of the students
14 in the School District?

00:24 15 MS. BECK: Well, the District hasn't taken any steps
16 to disenroll the students, but we do have an Order from Judge
17 Beavers indicating that they can be disenrolled.

18 THE COURT: I understand that. We all know that.
19 Are they going to be disenrolled or not?

00:24 20 MS. BECK: I believe that's the District's intention,
21 yes.

22 THE COURT: Well, what do they have to do to do that?

23 MS. BECK: Well, their records will need to be
24 transferred to their LEA which I -- and there's confusion as
00:24 25 to exactly what that is. It's either Black Horse Regional or

00:25 1 Sterling. Once the records are transferred, there will be
2 likely an INT meeting with both teams, the teams from their
3 new school as well as Gloucester City to ease the transition
4 of the students with respect to special education and they
5 will then -- I mean the next step will be taken by plaintiff.
6 She'll need to register as a student in her new school
7 district. But everything on Gloucester City's side will be
8 done. And as far as reporting to the State, the District,
9 Gloucester City will not be reporting those students on their
00:25 10 role to the State for the 2019 school year. So that's really
11 all that would entail.

12 THE COURT: Okay. Mr. Thurston, have you spoken or
13 has your client spoken with whatever school district where she
14 lives?

00:25 15 MR. THURSTON: Your Honor, yeah, not since the last
16 hearing, but I did, at one point, speak to that School
17 District and they said basically this is not our problem.

18 THE COURT: Well, what does that mean? I don't know
19 what that means.

00:25 20 MR. THURSTON: Well, I don't know what it means. I
21 mean basically --

22 THE COURT: What do you have in writing from them?

23 MR. THURSTON: I don't have anything in writing.

24 THE COURT: Why not?

00:26 25 MR. THURSTON: Well, because they refused to put

1 anything in writing.

2 THE COURT: What do you mean -- do you have a letter
3 to them asking them to do this?

4 MR. THURSTON: Yeah, I have. I asked them what the
5 status is from their perspective. They have not taken a
6 status. And, and, your Honor, I draw your attention -- and I
7 don't know if I raised this before, but I want to raise it
8 today. Part of IDEA, 20 USC, Section 1413, actually
9 Subsection E of that. So 1413E basically establishes -- so,
10 let me backup for a second. Let me start by saying this. I
11 think what this case is really about is money. Who's paying
12 for these kids to be there. Okay?

13 THE COURT: That's what it's always about.

14 MR. THURSTON: Well, that's right. And I think
15 what's going on here, your Honor, is is that Gloucester City
16 really should have gone after, I think it's Laurel Springs
17 School District, but it's a sending District. So I think it's
18 either Highland or Sterling High School should have gone after
19 them to reimburse Gloucester City for whatever the costs were
20 to keep the girls there. I don't -- moving the girls is
21 really a violation of IDEA in the Stay Put Rule. So their
22 solution, their remedy really should have been going after the
23 other school district. And actually 20 USC 1413E says exactly
24 that. It basically says, if they're a shared eligibility or
25 liability under IDEA for a Federal funding or State funding

1 for Special Ed students, that the -- you know, they should
2 share that responsibility. In this case, it's not even a
3 shared responsibility, according to Gloucester City. It's a
4 sole responsibility, but that's nevertheless the place.

00:27 5 Now let me give you an example how that plays out, your
6 Honor. For example, let's say you have a student who has
7 severe behavior problems. Okay? And your school's not set up
8 to handle that. So you send the student out of District.
9 Okay? For whatever reason. But for special needs. You are
00:28 10 the sending District at paying for that child to be out of
11 District. And that's what really should happen here, your
12 Honor.

13 THE COURT: Well, I don't know what should have
14 happened here. But what should have happened here is your
00:28 15 client should have gone to the new school District and started
16 the process and formally turned down and then you have
17 standing to be here. The lawyering on both sides of this case
18 leaves a lot to be desired, to be honest with you. I don't
19 have anything in front of me that said that they cannot
00:28 20 continue in that school District because the new District may
21 pay for them to continue in the old District. You don't have
22 anything from them that says they won't.

23 MR. THURSTON: But, your Honor, that's the point of
24 Stay Put. As soon as, as soon as you trigger, invoke Stay Put
00:28 25 which was in November of 2017, the children stay.

00:29 1 THE COURT: I understand that. But when there's a
2 voluntary move by the parent to a different District, Stay Put
3 doesn't work anymore unfortunately, and, you know, Judge
4 Jims-Beaves says that this is the equivalent of a voluntary
5 move to a new District. And I know it's a strange quirk in
6 the law but the Third Circuit seems to have affirmed. A
7 voluntary move ends State funds.

00:29 8 MR. THURSTON: I agree that's the Third Circuit's
9 position, your Honor. I disagree that this is a voluntary
10 move.

11 THE COURT: Well, I know. I mean it's -- I get that.

00:29 12 MR. THURSTON: And, in fact, your Honor, the facts
13 are pretty clear that the DCPD told K.K-M, that the children
14 could remain there at Gloucester City, and she would probably
00:29 15 not have accepted the responsibility of KLG had she not been
16 told -- had she been told differently. Had she been told,
17 well, the kids are going to have to eventually go to your
18 School District. So it's an involuntary move from the girls'
19 perspective. They needed someone to take care of them other
00:29 20 than their birth parents.

21 THE COURT: It's always an involuntary move on the
22 child's perspective because they're not old enough to give
23 voluntary consent.

00:30 24 MR. THURSTON: Well, that's right. But it's also
25 involuntary in the sense that New Jersey DCPD really kind of,

1 I don't want to say conned. That's not the right word. But,
2 you know, persuaded K.K-M without all full information into
3 the situation.

4 THE COURT: I'm not unsympathetic to your client.
5 She did the right thing here.

6 MR. THURSTON: Right.

7 THE COURT: For these kids. There's no question
8 about it.

9 MR. THURSTON: Right.

10 THE COURT: But it may have had untoward effects on
11 where they can go to school. I accept your representation.
12 She had no idea this might happen. But it may be what the law
13 required. The problem I have is the posture of the case here.
14 I cannot conclude that they wouldn't be at the same school
15 District. I cannot conclude that it violates the law for them
16 now to have to register in wherever District they live. I
17 don't know. Apparently there's some dispute, which I don't
18 understand why there should be any dispute about the District
19 in which they live. Without those kinds of things being
20 finalized, there's not much I can do. You certainly have a
21 right to appeal the Commissioner's decision, but that's not
22 how this has been framed.

23 MR. THURSTON: Well, we have, your Honor. We
24 appealed the Commissioner's decision. That's right now
25 sitting in the New Jersey Appellate Division. So the whole

1 residency issue piece of this is unresolved.

2 THE COURT: I understand that. But I'm not -- I'm
3 just talking about what's before me at this point.

4 MR. THURSTON: Right. I understand.

00:31 5 THE COURT: And what power I have to do anything at
6 this point in time. And I don't think I have a whole lot of
7 power to do anything at this point.

8 MR. THURSTON: Well --

9 THE COURT: Because the relief you seek here is for
00:31 10 an injunction. And I have to be satisfied that there's a
11 probability of success on the merits and it's very difficult
12 for me to be satisfied.

13 MR. THURSTON: Well, okay, let me address that, your
14 Honor. I believe there is and I believe the Third Circuit
00:32 15 case of R.B. versus Mastery Charter is the one that gives you
16 that authority because that's a very similar kind of case.

17 The child was basically disenrolled from a school that arose
18 out of the Eastern District of Pennsylvania, but then went to
19 the Third Circuit. The child there was disenrolled but was
00:32 20 also a Special Ed student and the Third Circuit said, you
21 cannot disenroll a student while they're in Stay Put. Stay
22 Put prevails over disenrollment and State law when it comes to
23 that procedure. So, I think that's the authority that
24 suggests that we will be successful on the merits because I
00:32 25 believe that, that Third Circuit precedent is what guides here

1 and that is the Stay Put Rule. Once -- Stay Put was invoked
2 in 2017 says and the DeLeon case says that you cannot move
3 children that will significantly impact their educational
4 environment. You cannot move them, change schools and R.B.
5 says you can't disenroll them either. So -- I mean those two
6 cases, I think, gives you the authority to say wait a minute,
7 let's at least put a status quo on this until it's resolved in
8 all the other courts. And the Stay Put Rule says it has to be
9 resolved until -- can't be -- you can't change placement or
10 you can't change Stay Put until resolution of all the appeals
11 of those issues. And, you know, there's no question that this
12 is going to significantly impact their education. I mean I've
13 got letters here from -- written by the girls who said that it
14 would be devastating for them to leave these schools.

15 Now -- and I don't think it's the plaintiffs'
16 obligation to go to the new school. I'm happy to do so, your
17 Honor, but I don't think it's the plaintiffs' obligation to go
18 to the new school. I think that was Gloucester City's
19 obligation. Whether they waive that right or not, that's
20 irrelevant to me. The girls should not be moved because of
21 maybe something they should have done. But the last issue --
22 the last thing I want to say --

23 THE COURT: I'm sorry, I don't read the Rule, I don't
24 think the Rule requires the old school district to go to the
25 new school district. I read the statute to require that the

1 student, the guardian of the students go to the new school
2 district to register them.

3 MR. THURSTON: No, that's actually not true, your
4 Honor, because under both IDEA and the, the DCPP, the New
5 Jersey Stability Act, both of those say if -- depending on
6 what the determination is as to what the school district or
7 where they reside, the old school District is supposed to
8 report to the new school district.

9 THE COURT: They are.

10 MR. THURSTON: Right.

11 THE COURT: They send all their records.

12 MR. THURSTON: Well, they also have to advise them
13 that, you know, you're now responsible for these children.

14 THE COURT: Well, that's what counsel just said
15 they're going to do.

16 MR. THURSTON: Well, yeah, but that means that if
17 there's payment or if there's a cost to keep the children in
18 their current placement, then they have to, they have to pay
19 that. That's their responsibility.

20 THE COURT: There's no question that the new district
21 is responsible financially.

22 MR. THURSTON: Yup.

23 THE COURT: For whatever the appropriate education is
24 for these kids, and if that means sending them back to
25 Gloucester, paying Gloucester, so be it. But that's-- I don't

1 disagree with anything you say, but all that's happened
2 according to counsel's representation, they are informing the
3 new District that these students are coming and here's the
4 records and here's what we have found and then their, their
5 team that is to meet with the new new team to come together
6 with an IDEA now for each of those students.

7 MR. THURSTON: That's correct, your Honor. And, and
8 in a normal circumstance, I agree with everything, that's the
9 procedure. This is not the normal circumstance. This is a
10 circumstance where Stay Put was invoked. DeLeon in the Third
11 Circuit says you cannot move those children if it will
12 significantly impact their education. It certainly will.
13 These children have been in the school system the whole time.
14 They have friends there. They know the teachers. They know
15 the staff. They're comfortable in their environment. The
16 result of moving them to another school, they're not going to
17 know students, they're not going to know any teachers, they're
18 not going to know any staff. That is going to significantly
19 impact their education.

20 THE COURT: We don't know they're going to any new
21 school. We don't know that.

22 MR. THURSTON: Well, I don't understand that, your
23 Honor.

24 THE COURT: Because with all his friends, whoever it
25 is, can agree to send them back to Gloucester and pay for it

1 if they don't have an equivalent program.

2 MR. THURSTON: Well -- so, I'm trying to understand,
3 your Honor. Are you suggesting that I'm -- I should sue
4 Laurel Springs for this?

00:36 5 THE COURT: No. All I'm suggesting -- I suggested
6 this in May that you find out from the new District what
7 they're going to do with these two kids.

8 MR. THURSTON: Okay. I'm happy to do that, your
9 Honor. But the problem is in the meantime there are summer
00:37 10 activities that are going on through this District that if
11 they disenroll them, these children are not going to be
12 eligible for those, those programs.

13 THE COURT: Have you asked the Appellate Division for
14 relief pending the appeal?

00:37 15 MR. THURSTON: I don't know what relief I would seek
16 from the Appellate Division.

17 THE COURT: Enjoin Gloucester from disenrolling them
18 until the appeal is over. They have the authority to do that.
19 And you're asking me to enjoin Gloucester because of an appeal
00:37 20 pending in an entirely different court system.

21 MR. THURSTON: Well, no, I'm not. I'm not, I'm not
22 saying you to enjoin them under the Stay Put Rule. Under
23 Federal law taking superiority over New Jersey law.

24 THE COURT: Yes, but the Third Circuit has carved
00:38 25 out, and we discussed this, has carved that exception for

1 voluntary relocation of students.

2 MR. THURSTON: Okay. Well, I mean, your Honor, from
3 my perspective, that's the key focus. It's not a voluntary
4 and I understand that's what Judge Beavers ruled, but I don't
5 believe it's a voluntary removal.

6 THE COURT: Well maybe the Appellate Division will
7 agree with you and that will take care of the problem, but I
8 think, I would have thought two things would have happened.
9 Number one, you would have done what I asked you to do back in
10 the spring and find out what the new school district intends
11 to do if anything. And you would have asked the Appellate
12 Division to stay Judge Beavers' ruling pending the outcome of
13 that appeal. But I don't think on the record before me I can
14 conclude there's a likelihood of success on the merits for
15 this injunction proceeding because, frankly, I agree with
16 Judge Beavers' finding that this is the equivalent of a
17 voluntary relocation of these students. And I know it sounds
18 crazy and it seems unjust and unfair, but unfortunately I
19 think that's what the law provides here, because your client
20 did everything, everything great, everything good for these
21 kids and now, and I just think -- well, maybe the Appellate
22 Division will see it your way.

23 MR. THURSTON: Okay. Thank you, your Honor.

24 THE COURT: I'm going to deny your request for an
25 injunction for the reasons stated and see what happens over

1 the summer. But you should be before the Appellate Division
2 asking them to stay that disenrollment until they get a chance
3 to decide this appeal.

4 MR. THURSTON: Thank you, your Honor.

5 THE COURT: All right? Anything else?

6 MS. BECK: Nothing further, your Honor.

7 THE COURT: All right. Thank you, everybody. Good
8 luck.

9 MR. THURSTON: Thank you.

10 (The matter was then concluded)

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1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter.

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4 /S/ Carl Nami, Official Court Reporter

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6 Court Reporter/Transcriber

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8 July 2, 2019

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